84-371

Office - Supreme Court, U.S.
FILED
AUG 27 1984
ALEXANDER L. STEVAS.
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IN THE
SUPREME COURT OF THE UNITED STATES

No.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

versus

JOHN J. KISKO, JR.,

Petitioner

PETITION FOR A WRIT OF CERTIORARI
FROM THE SUPREME COURT OF PENNSYLVANIA

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(a) QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT THE DEFENDANT WAS DENIED DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHERE THE COMMONWEALTH'S MOTION FOR CHANGE OF VENUE WAS PRESENTED--AND OPPOSED BY THE DEFENDANT--IN FRONT OF ONE JUDGE, AND WITHOUT EXPLANATION, THE MOTION WAS ACTED UPON BY ANOTHER JUDGE WHO NEVER GAVE THE DEFENDANT THE OPPORTUNITY TO BE HEARD ON THE MATTER?

II. WHETHER OR NOT THE DEFENDANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE UNITED STATES CONSTITUTION WHERE THE PROSECUTION REFILED WITHOUT FURTHER EVIDENCE CRIMINAL CHARGES WHICH WERE ORIGINALLY DISMISSED FOR WANT OF A PRIMA FACIE CASE MERELY IN ORDER TO SUBMIT THE SAME EVIDENCE TO A DIFFERENT DISTRICT MAGISTRATE?

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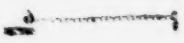

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(b) LIST OF PARTIES

Petitioner:

John J. Risko, Jr., represented by

Richard J. Orloski, Calnan & Orloski, P.C.

Respondents:

Commonwealth of Pennsylvania, represented by

William Platt, District Attorney of Lehigh

County,

- and -

LeRoy Zimmerman, Attorney General of

Pennsylvania

(c) TABLE OF AUTHORITIES

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(d) OFFICIAL AND UNOFFICIAL REPORTS

Commonwealth v. John Risko

_____ Pa.Sup. _____, A.2d (198)

(e) STATEMENT OF JURISDICTION

The final judgment of the Supreme Court of Pennsylvania denying leave to appeal was rendered on June 28, 1984, and the Petition for Writ of Certiorari is timely filed within sixty (60) days thereof. The jurisdiction of this Court rests upon Rule 20.4 of the Rules of the Supreme Court, and 28 U.S.C. §2101(c).

(f) CONSTITUTION & STATUTORY PROVISIONS

"...nor shall any state deprive any person of Life, liberty or property without due process of law...."

Fourteenth Amendment to the U.S. Constitution

(g) STATEMENT OF THE CASE

On October 18, 1979, a Complaint was issued by District Magistrate Ralph Beck, charging the Defendant, John J. Risko with Theft By Unlawful Taking Or Disposition, Theft By Required Disposition Of Funds Received and Receiving Stolen Property Under §§8921(a) 3927 and 3925 of Pa. Crim. Code.

At the time the Complaint was issued, the Defendant was the head clerk at the municipal garage of the City of Allentown. The charges brought against the Defendant involved various auto parts ordered and picked up by the Defendant at auto parts suppliers for the City of Allentown that were allegedly never delivered to the municipal garage by the Defendant.

On November 15, 1979, a preliminary hearing on these charges was held in Magisterial District 31-1-04 before District Justice Ralph Beck. The charges against the Defendant were dismissed and the Defendant discharged for lack of all the necessary elements of a prima facie case on the charges against the Defendant.

Five days later, on November 20, 1979, a new complaint was filed by the District Attorney against the Defendant, based upon exactly the same evidence used to support the first complaint of October 18, 1979. Thereafter, the District Attorney moved for a change of magesterial venue. The Petition For A Change Of Venue was accompanied only by an Affidavit by the District Attorney and gave no reason for changing district magistrates.

A third complaint was issued on the same day reciting the same charges pursuant to §§3922 and 3927 of the Pa. Crimes Code, having as their substance the same instances charged in the complaints of October 18, 1979

and November 20, 1979. Both complaints of November 20, 1979 were issued by Magistrate George H. Shadler, for Magistrate Beck.

A preliminary hearing was originally scheduled for December 7, 1979. For reasons unknown to the Defendant, however, the matter was continued, apparently at the request of the Commonwealth. Thereafter the Commonwealth filed a motion for change of venue.

On December 28, 1979, an argument was held on the Commonwealth's motion for a change of venue before Judge James N. Diefenderfer. Judge Diefenderfer specifically indicated that he was not going to act on the motion and that the case would have to be re-argued before the President Judge. By Order dated January 2, 1980, President Judge Martin J. Coyne granted the Commonwealth's motion without giving the Defendant an opportunity to be heard on the motion, and reassigned the case to another Magistrate, District Justice Joseph Maura, who covers 31-1-06.

The preliminary hearing conducted by Magistrate Joseph Maura was held on January 7, 1980. The Defendant and his attorney were not aware of the change of venue prior to the preliminary hearing because there was never a hearing before the President Judge on the Commonwealth's motion for change of venue. The Defendant, by and through his attorney, requested that the preliminary hearing be continued until a formal petition could be submitted to the court protesting the ex parte change of venue in this matter. The said motion by Defendant's counsel was denied and the preliminary hearing was conducted.

The Defendand filed pre-trial motions objecting to the ex parte change of venue and the amendment of the magistrate's complaint filed at the preliminary hearing. A hearing on both applications was conducted before the Honorable Maxwell E. Davison, and on April 21, 1980, the Court issued an Order denying

both applications.

The jury trial was thereupon commenced on May 9, 1980 with the Honorable John E. Backenstoe presiding. During the trial, an employee of Allentown Brake and Wheel, a Commonwealth witness, Clifford Christ, Jr., testified that the Defendant ordered and picked up a Commercial brand pump under Defendant's authority as a clerk for the City's Municipal Garage. (N.T., 11-22). Paul Kachline and Walter Schmoyer, employees of the Pollard Tire Company, Allentown, testified that the Defendant ordered and picked up under his authority as a clerk at the garage four L78-15 tires; 2 #472 batteries; and 2 #524 batteries. (N.T., 22-41).

Next, various employees and supervisors at the Municipal Garage testified on behalf of the Commonwealth concerning the inventory procedure at the garage. None of the employees remember order the parts involved in this case, and none remembered seeing the

Defendant unload the parts at the garage. However, upon cross-examination, these witnesses testified that there was no recorded, complete inventory system at the garage to enable them to determine whether certain parts were in stock or whether they were used in a vehicle immediately.

Commonwealth witness, Betty Yeahl, payroll clerk for the garage, testified that when an invoice for a part came in, it was put in a desk drawer unlocked, in the work area, where it remained until she came out to collect invoices and charge them out. (N.T., 136). Mrs. Yeahl stated that dhe did not know if the parts were coming in or out, because she only looked at the invoices. When asked about missing invoices, the witness responded that at one time 86 invoices were missing. (N.T., 144).

Commonwealth witness, Tommy Lehr, Chief Mechanic for the day shift at the Municipal Garage, testified that only certain items

were kept on an on-going type inventory: "Fast moving things like air filters, oil filters, spark plugs, batteries, and some tires." If an invoice was not turned in, a part would not be entered on the inventory, and the garage would not learn of it until the company that sold the part sent another invoice. (N.T., 168-170). The exact disappearance date of an item is virtually impossible to discern.

Mr. Lehr testified that the garage was open 24 hours a day, seven days a week and that the stockroom was usually unlocked during the day shift. Police officers, firemen, and streets department personnel had access to the stockroom and entered it freely because there was a telephone there. The general public could possibly even walk back to the stockroom. (N.T., 178-181).

At the close of the Commonwealth's presentation of the evidence, counsel for the Defendant demurred to each of the three

counts charged against the Defendant: Theft By Failure To Make Required Disposition for the Commercial brand pump from Allentown Brake and Wheel; Theft By deception for tires and batteries from Pollard Tire Company; and Theft By Deception for various items from Allentown Auto Parts. The Demurrer was denied.

Richard Nechetsky, a witness for the Defense, a gas attendant at the Municipal Garage during the period the thefts allegedly occurred, testified that he had seen a uniformed police officer remove bulbs and wire from the stockroom and carry them out in a bag. Mr. Nechetsky called lunch time at the Municipal Garage a "free-for-all" because various city employees would help themselves to parts while most of the garage employees were gone. (N.T., 477-481).

The Defendant, John J. Risko, an employee of the City of Allentown for 11 years at the time of the alleged incidents of theft,

testified on his own behalf that he ordered a Commercial pump on August 15, 1979, from Allentown Brake and Wheel, and that he brought it back to the Municipal Garage. (N.T., 532-533).

In addition, Mr. Risko stated that he ordered tires and batteries from Pollard Tire Company on September 25, 1979, and picked them up and delivered them to the garage on the following day. (N.T., 547).

At the clost of the Defense's case, counsel for Defendant moved for a directed verdict and submitted instructions and Points For Charge. The motion for a directed verdict of Not Guilty was denied.

On December 29, 1981, the Defendant was sentenced to pay the costs of prosecution, make restitution to the City of Allentown in an amount not to exceed $1,155.73 and to undergo imprisonment in the Lehigh County Prison for nine to 36 months. Defendant was ruled eligible for work release upon comple-

tion of one-third of his minimum sentence.

Thereafter, a timely appeal to the Superior Court was filed. At oral argument, the Superior Court orally requested that the Commonwealth file a supplemental brief concerning 1) the issue of judge shopping by filing the csame charges after dismissal of the first charges, and then successfully changing district magistrates in a proceeding where the Defendant was not given the opportunity to be heard; and 2) the issue of imposing a jail sentence on a theft case where the probation officer was recommending probation. After the Commonwealth filed its supplemental brief, Defendant's counsel was given an opportunity to respond.

After reviewing the briefs, and supplemental briefs, the Court affirmed the conviction, and the sentence of imprisonment without discussing the issue of "judge shopping" and the usage of the ex parte proceeding to obtain this result. A Petition For Allowance Of Appeal to the

Supreme Court of Pennsylvania was denied, without comment, on June 28, 1984. The matter is now before this Court for disposition on Defendant's Petition For Certiorari to the Supreme Court of Pennsylvania.

(h) ARGUMENT

I. WHETHER OR NOT THE DEFENDANT WAS DENIED DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHERE THE COMMONWEALTH'S MOTION FOR CHANGE OF VENUE WAS PRESENTED--AND OPPOSED BY THE DEFENDANT--IN FRONT OF ONE JUDGE, AND WITHOUT EXPLANATION, THE MOTION WAS ACTED UPON BY ANOTHER JUDGE WHO NEVER GAVE THE DEFENDANT THE OPPORTUNITY TO BE HEARD ON THE MATTER?

An elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated, under all of the circumstances to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. Memphis Light, Gas and Water Division v. Craft 436 U.S. 1 (1978). The opportunity to be heard must be granted at a meaningful time and in a meaningful manner. See, e.g., Parratt v. Taylor 451 U.S. 527 (1981); Parham v. Cortese 407 U.S. 67 (1972).

Although the criminal sphere is traditionally a state court's arena, a federal court should not hesitate to reverse any ruling inconsistent with the U.S. Constitution, particularly when procedural due process is an

issue. Rochin v. California 342 U.S. 165, 168-170 (1951). The failure to accord an accused a fair hearing violates even the minimal standards of due process. Groppi v. Wisconsin 400 U.S. 505 (1971); Turner v. Louisiana 379 U.S. 466 (1965). The Defendant Risko, was denied these minimal standards of due process. Not only was he denied the opportunity to be heard in a meaningful time and in a meaningful manner, Risko was denied any hearing whatsoever to oppose the Commonwealth's motion for change of venue, in violation of both the U.S. Constitution and Pennsylvania Rules of Criminal Procedure. In Commonwealth v. Sufrich ___Pa.Sup. ____ 466 A.2d 1058 (1983), the court held as follows:

> "We believe that whether the court order in question is considered to be a change of venue under Rule 306 or a temporary assignment under Rule 23, fairness requires that appellants be given notice of the Commonwealth's request for a transfer, which should be in the form of a written motion. Appellants must also be given an opportunity to respond to such a request.

Therefore, we will reverse the order of the trial court and remand this case so that the proper procedure may be followed."

____ Pa.Sup. at _____,
466 A.2d at 1060

In the case at bar, the trial court justified its refusal to give the Defendant a hearing to contest the change of venue under Rule 23 of Pa. R.Crim.P. As indicated in Commonwealth v. Sufrich, supra, a transfer under Rule 23, or a change of venue under Rule 306 still requires Due Process of Law, meaning notice of the proposed change, and an opportunity to oppose the change. Since this was not done, Due Process under the United States Constitution demands that Defendant be given the opportunity to be heard, and to contest the transfer.

The Defendant had a constitutional right to be heard when the Commonwealth requested a transfer from one magistrate to another. Attorneys for the Commonwealth and the Defendant appeared before Judge Diefenderfer when the Commonwealth presented the motion

for change of venue. Judge Diefenderfer indicated that he was referring the matter to President Judge Coyne, and that the President Judge would be in touch with them. The President Judge, however, never contacted counsel, never scheduled a hearing, and never gave the Defendant an opportunity to respond. President Judge Coyne merely granted the motion. This error was prejudiced and in violation of the Defendant's constitutional right to be heard guaranteed by the Due Process clause of the United States Constitution. The right to a hearing is fundamental. Denial of a hearing required by the Pennsylvania Rules of Criminal Procedure constitutes a violation of the due process clause of the United States Constitution.

II. WHETHER OR NOT THE DEFENDANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES WHERE THE PROSECUTION REFILED WITHOUT FURTHER EVIDENCE CRIMINAL CHARGES THAT WERE ORIGINALLY DISMISSED FOR WANT OF A PRIMA FACIE CASE MERELY IN ORDER TO SUBMIT THE SAME EVIDENCE TO A DIFFERENT DISTRICT MAGISTRATE?

Due process of law in a criminal prosecution consists of a law creating or defining the offense, an impartial tribunal of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial according to established procedure and discharge unless found guilty. Simons v. U.S. 119 F.2d 539, 544 (9th Cir, 1941); cert denied 314 U.S. 616 (1954). The Petitioner, John J. Risko, was originally discharged in the first preliminary hearing on November 15, 1979, and the claim against him dismissed for want of evidence establishing a prima facie case by District Judge Beck. The evidence presented did not establish a criminal claim against Risko.

Where an examining magistrate dismisses a prosecution at an initial preliminary ex-

amination on the grounds that there is insufficient evidence to hold defendant for trial, a magistrate at a second preliminary examination is bound by the ruling of dismissal where the evidence at the second preliminary examination is substantially the same and there is no additional evidence or other good cause to justify another preliminary examination. See 22 C.J.S. Criminal Law §347.

Although the particular issue has not been addressed by this Honorable Court, this is the accepted rule concerning dismissal and re-arrest in Pennsylvania. See, e.g., Commonwealth v. Heatherington 460 Pa. 17, 32 A.2d 205 (1975); Commonwealth v. Prado 481 Pa. 485, 393 A.2d 8 (1975), and is also accepted by all other jurisdictions that have addressed this issue. See, e.g., Nittke v. State 80 Wisc. 332, 259 N.W.2d 515 (1977); Patterson v. State 497 P.2d 944 (Okla Cr, 1972); Wilson g. Garrett 104 Ariz, 51, 448 P.2d 857 (1969).

The policy behind disallowing re-arrest unless further evidence is presented is the condemnation of judge shopping and fairness to the defendant. Jones v. Oklahoma 481 P.2d 169 (Okl. Cr, 1971); Wilson v. Garrett 104 Ariz, 51, 488 P.2d 859 (1969).

1. Seeking a different magistrate after the re-filing of the charges is flagrant judge shopping. Although it is well accepted that re-arrest is allowed only if new evidence is discovered, Commonwealth v. Heatherington 400 Pa. 17, 32 A.2d 205 (1975), the Commonwealth re-arrested Petitioner Risko, based upon exactly the same evidence under which the Commonwealth's original claim was dismissed. The Commonwealth did not seek leave from the Court to re-arrest the Defendant after the dismissal of the charges against him. Instead, they merely proceeded without leave of court to re-file the same charges on the same evidence before the same magistrate. Realizing that the same magistrate would be hearing the same evidence, the Commonwealth

then moved to change magistrates in the hopes of obtaining a different result.

The Commonwealth filed a motion with Judge Diefenderfer requesting that the case be assigned to a different magistrate. Under Rule 21 of the Pa.R.Crim.P., venue was proper before District Magistrate Beck. The Commonwealth objected to this venue, but failed to specify the exact nature of its objection other than that District Magistrate Beck previously dismissed the charges. Under Rule 25(b), an objection to venue cannot be sustained unless the moving party demonstrates "substantial prejudice":

> "No objection to venue [before a district magistrate] shall be allowed unless substantial prejudice will result if the proceeding is allowed to continue before the issuing authority before whom it has been brought."
>
> Rule 25(b) of Pa.R.Crim.P.

The Commonwealth never alleged substantial prejudice, and never proved it. Despite this absence of prejudice, the Commonwealth received what it wanted: a different magistrate to hear the same evidence.

In getting the magistrate changed, the Commonwealth never held a hearing to establish that 1) there was new evidence; or 2) the magistrate who originally heard the case was somehow unqualified to re-hear the case. Instead, Judge Coyne accomodated the Commonwealth--without requiring the Commonwealth to prove that the change of magistrates was necessary, or without giving the Defendant an opportunity to appear and be heard. This procedure--the re-arrest, the request for a change of magistrates without reasons therefor, the failure by the President Judge to hold a hearing on the request for the change of magistrates, and the failure to produce "new" evidence against the Defendant at the second hearing is wholly deficient under the Due Process Clause of the United States Constitution.

2. Allowing re-arrest without the production of further evidence violates fundamental ideas of fairness.

Convictions must be consistent with the criminal systems' ideas of fundamental fairness and justice. U.S. v. Price 258 F.2d 981 (3d Cir, 1958), cert denied 358 U.S. 922 (1959). Those that are inconsistent with such ideas violate the due process clause of the Fourteenth Amendment. Id. at 921. Bringing a dismissed cause of action before a different magistrate with the same evidence, in hopes of succeeding the second time around, violates fundamental ideas of fairness. Magistrates are charged with the responsibility of determining whether there is sufficient evidence to hold a defendant for court. Commonwealth v. Weinstein 177 Pa.Super. 1, 109 A.2d 235 (1955). It had already been determined by Magistrate Beck that the evidence against the Defendant was insufficient to support a prima facie case. The same evidence should not have been presented to a different magistrate in the hope of obtaining a ruling more "satisfactory" to the

Commonwealth.

The policy behind disallowing such unfair practice is the same as that behind disallowing double jeopardy, specifically, protecting the individual from being subjected to the hazards of trial and conviction more than once for an alleged offense. U.S. Const. Amend. V, Art. V; Green v. U.S.355 U.S. 184 (1957). Although the case at hand involves dismissal and consequently the Defendant was not tried twice, he was twice subject to the opinion of different judges on the same alleged offense in light of the same evidence.

The same evidence should not bring different results depending on the magistrate, for the sake of both fairness and consistency. Furthermore, an adverse decision in and of itself does not afford the Commonwealth an opportunity to try again to establish a prima facie case based upon the same evidence.

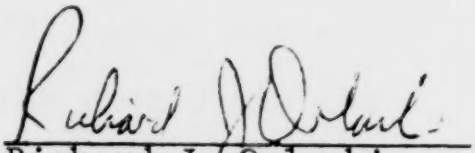
Yet, this is exactly what transpired here. The Commonwealth could not prove a prima

facie case of theft before Magistrate Beck, so the District Attorney re-arrested the Defendant on the same evidence, and obtained a new magistrate to hear the case again. This is exactly the constitutional defect noted in Commonwealth v. Heatherington 460 Pa. 17, 331 A.2d 205 (1971), which voids Defendant's conviction under the Due Process Clause of the United States Constitution.

(i) CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari must be granted.

CALNAN & ORLOSKI, P.C.



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COURT OF COMMON PLEAS OF LEHIGH COUNTY
CRIMINAL ACTION-LAW

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	NO. 87 of
	)	1980
JOHN J. RISKO,	)	
Defendant	)	

O R D E R

NOW, September 9, 1981, after argument, upon consideration of the record and the briefs of counsel, and for the reasons set forth in the accompanying Opinion,

IT IS ORDERED that the defendant's motion for a new trial be and the same is hereby denied and dismissed and the defendant is directed to appear for sentencing on November 24, 1981 at 9:30 o'clock a.m., in Courtroom No. 3, Lehigh County Courthouse.

The Lehigh County Probation Office is directed to prepare a presentence investigation and report.

BY THE COURT:

/S/ MAXWELL E. DAVISON
Maxwell E. Davison, Judge

/S/ JAMES N. DIEFENDERFER
James N. Diefenderfer, Judge

/S/ KENNETH H. KOCH
Kenneth H. Koch, Judge
Specially presiding

COURT OF COMMON PLEAS OF LEHIGH COUNTY
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA)
)
vs.) NO. 87 of 1980
)
JOHN J. RISKO,)
Defendant)

* * * * * * *

APPEARANCES:
MICHAEL E. MOYER, ESQUIRE, ASSISTANT DISTRICT ATTORNEY, with him, WILLIAM H. PLATT, ESQUIRE, DISTRICT ATTORNEY,
On behalf of the Commonwealth.

JAMES L. HEIDECKER, JR., ESQUIRE,
On behalf of the Defendant

* * * * * * *

OPINION OF THE COURT EN BANC

MAXWELL E. DAVISON, Judge.

We have before us for disposition John J. Risko's post-verdict motion for a new trial. Procedurally, on October 18, 1979, a criminal complaint was issued against the defendant, charging him with theft by unlawful taking or disposition, theft by failure to make required disposition of funds received, and receiving stolen property. Following a preliminary hearing held in magisterial district 31-1-04 on November 15, 1979, District Jus-

tice Ralph Beck dismissed the charges. Five days later, the district attorney filed a new complaint against the defendant and thereafter moved for a change of magisterial venue. By Order dated January 2, 1980, President Judge Martin J. Coyne granted the Commonwealth's motion and assigned the case to another magistrate. At the subsequent preliminary hearing held in district 31-1-04 on January 7, 1980, assigned district justice Joseph Maura determined that a prima facie case had been established and, consequently, bound over for court the charges of theft by deception and failure to make required disposition of funds received. After various defense pre-trial motions were heard and denied, the case proceeded to trial, where a jury found the defendant guilty of all counts of the information on May 14, 1980.

In support of his motion, the defendant essentially assigns as error the following: (1) the Court's refusal to grant his pre-

trial motion challenging the change of magisterial venue,[1] and (2) the Court's denial of his pre-trial applications to quash the magistrate's return and information. Even though the defendant also challenges the sufficiency of the evidence and certain rulings of the Court in his motion, he neither briefed nor argued these points in any manner. Accordingly, we deem the unaddressed issues waived. See Commonwealth v. Dessus, 262 Pa. Super. Ct. 443, 396 A.2d 1254 (1978).

Claiming initially a violation of his constitutional right to procedural due process of law, the defendant contends that the Court erred in granting the Commonwealth's motion

[1]Since the defendant objected to the purported change of venue before the completion of the preliminary hearing, his objection has not been waived. See Pa.R.Crim.P. 25(a).

to change magisterial venue. Moreover, because the Commonwealth only submitted an affidavit executed by an assistant district attorney in support of its motion, the defendant further argues that no evidence sufficiently demonstrated the "substantial prejudice" required for a venue change under Pa.R.Crim.P. 25(b). We disagree with both contentions.

First, President Judge Coyne's Order of January 2, 1980, in no way stemmed from an ex parte proceeding: the Court granted the Commonwealth's motion only after notice and a hearing on December 28, 1979,[2] in which the prosecutor and defense counsel participated. Although defense counsel chose to present no

---

[2]In order to avoid any possible confusion, we note that The Honorable James N. Diefenderfer, who heard argument on the Commonwealth's motion on December 28, 1979, took the matter under advisement in order to consult with the President Judge. Judge Coyne issued an Order in this matter on January 2, 1980.

counter-affidavit[3] or other evidence at this hearing, he broadly contested "certain factual allegations" in the Commonwealth's motion and specifically challenged the Commonwealth's two-fold assertion that a prima facie case had been established at the initial preliminary hearing and that additional evidence would be presented at the subsequent hearing to establish such a case further. Because the defendant enjoyed and obviously utilized his right to object and argue against the Commonwealth's motion at this juncture, any allegation concerning a potential due process infirmity clearly lacks merit.

---

[3]Notably, defense counsel was given notice of the Commonwealth's intention to present the motion for a change of venue as well as a copy of the motion. Therefore, a counter-affidavit could have been filed.

Second, the ruling of January 2, 1980, violated no magisterial venue rules. Specifically, Pa.R.Crim.P. 21 prescribes that criminal proceedings be brought either before the issuing authority for the magisterial district where the offense allegedly occurred or before an issuing authority on temporary assignment to serve such a magisterial district. Case law similarly defines venue as the proper forum for bringing or hearing an action. See Commonwealth v. Shaheen 257 Pa. Super. Ct. 393, 390 A.2d 1294 (1978) (per Hoffman, J. with two judges concurring and one concurring in result), aff'd sub nom. Commonwealth v. Ryan 484 Pa. 602, 400 A.2d 1264 (1979); Commonwealth v. Ziegler 251 Pa. Super. Ct. 147, 380 A.2d 420 (1977). Notably under Pa.R.Crim.P. 25(b), no objection to venue--meaning change of venue--shall be permitted unless substantial prejudice will result from the case's continuing with the issuing authority before whom it was brought.

As reflected by the return, district justice Maura conducted the hearing in question at magisterial district 31-1-04, the proper district for bringing this criminal proceeding. Therefore, we conclude that the President Judge, in granting the Commonwealth's motion, merely exercised his authority to assign the case to another district justice. Because no actual change of venue occurred, we find the defendant's argument--that the Commonwealth failed to demonstrate the requisite "substantial prejudice" for a change of venue under Pa.R.Crim.P. 25(b)--unpersuasive.

Furthermore, we deem the Court's temporary assignment of district justice Maura to this case appropriate. Under Pa.R.Crim.P. 23, the President Judge of a judicial district may temporarily assign the issuing authority of any magisterial district to serve another district where such assignment becomes necessary for the efficient administration

of justice.[4]

Unequivocally, according to Commonwealth v. Hetherington, 460 Pa. 17, 331 A.2d 205 (1975) and Commonwealth v. Prado, 481 Pa. 485, 393 A.2d 8 (1978), the Commonwealth enjoyed the right to refile charges against the defendant before any magistrate authorized to hear the case, even though the original complaint had been dismissed. Because the assistant district attorney handling this case also represented to the Court that district justice Beck preferred not to hear the case again, the Order temporarily assigning a district justice properly and expeditiously resolved

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[4]Tangentially, the defendant argues that he first received notice of the Order dated January 2, 1980 at the preliminary hearing, which was held on January 7, 1980. Under Pa.R.Crim.P. 23(a), however, notice of such a temporary assignment need only be placed on file with the Clerk of Courts. This Order, filed with the case papers, clearly satisfied the rule.

the matter.[5] Furthermore, it is clear that the drafters of the Rules of Criminal Procedure did not contemplate the dismissal of proceedings at the magisterial level by reason of improper venue. Indeed, Pa.R.Crim.P. 25(c) prohibits such dismissal for improper venue.

Next, the defendant asserts that the Court erred in failing to quash the magistrate's return and information. Notably, the criminal complaint presented at the preliminary hearing somewhat inaccurately recited when and where the alleged offenses occurred. Because the district justice permitted the prosecutor

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[5] Because the Commonwealth petitioned the Court to select a magistrate to hear the case, the defendant's allegation of "forum or judge shopping" appears unfounded. See Commonwealth v. Shaheen, supra at ____, ____ n.6, 390 A.2d at 1296 n.6, aff'd sub nom, Commonwealth v. Ryan, 484 Pa. 602, 400 A.2d 1264 (1979).

to address matters at the preliminary hearing allegedly beyond the scope of the complaint, the defendant claims a violation of his constitutionally-guaranteed right to due process of law. We find no infringement.

Specifically, the complaint in question averred that the defendant had committed a number of thefts on or about "February 6, 1979 thru September 28, 1979 and divers other times." Because the probable cause affidavit contained the dates "February 6, 1978 through September 28, 1979," we appreciate that the complaint contained typographical errors. At the preliminary hearing, district justice Maura similarly recognized the technical infirmities but disallowed any specific amendment of the complaint. Since the complaint alleged "divers other times", however, the magistrate properly permitted the Commonwealth to introduce evidence of incidents that occurred prior to February 6, 1979.

We conclude that the complaint, as drafted, provided the defendant with sufficient notice of the pending charges and hold that the defects cited by the defendant are informal at most. Consequently, the defendant was not prejudiced thereby. See Commonwealth v. Krall 452 Pa. 215, 304 A.2d 488 (1973); Commonwealth v. Baranyai ___Pa. Super. Ct. ___, 419 A.2d 1368 (1980). See also Commonwealth v. Hess 489 Pa. 580, 414 A.2d 1043 (1980) (Court's right to exercise jurisdiction over person accused in criminal case is dependent upon Commonwealth;s ability to establish a prima facie case).

Finally, we are constrained to emphasize that the defendant challenges solely the preliminary hearing stage of the proceedings. Magisterial hearings, hoever, determine merely whether sufficient evidence exists to connect a defendant with a crime, not actual guilt or innocence of a defendant. See Commonwealth v. Rick 244 Pa. Super. Ct. 33, 366 A.2d 302 (1976). Since the defendant

in this case exercised and enjoyed his right to a fair jury trial, we find his arguments, premised exclusively upon pre-trial matters, without merit.

SENTENCE

The Order of the Sentence of the Court is that you pay the costs of prosecution, make restitution in the amount not to exceed $1,155.73 to the City of Allentown, and that you undergo imprisonment in the Lehigh County Prison for a period of not less than nine months nor more than thirty-six months and stand committed until this sentence is complied with. Defendant shall be eligible for work release upon completion of one-third of his minimum sentence.

COURT OF COMMON PLEAS OF LEHIGH COUNTY
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA)
) NO. 87 of
vs.) 1980
)
JOHN RISKO)

* * *

MEMORANDUM OPINION

John Risko was tried and convicted of Theft By Deception and Theft By Failure To Make Required Disposition. Both offenses are misdemeanors of the 1st degree. The maximum statutory penalty is 5 years in prison and/or a fine not to exceed $10,000.00. The evidence revealed that the City of Allentown, after the discovery of serious discrepancies in the inventories of the city garage, contacted its police force to investigate the matter. As a result of that investigation the defendant, as the chief clerk of the garage, was charged with the aforesaid offenses for certain missing items, (tires, batteries, etc.) totalling $1,155.73. Defendant has two prior convictions: obtaining a motor vehicle by fraud

(7/16/65) and three counts of burglary, larceny and reciving (8/31/65) for which he received a sentence of 11-23 months in Lehigh County Prison. The defendant is 34 years of age, divorced, and a father of three children. At the time of sentence he was working as a salesman at an automobile agency. He was sentenced to pay the costs, make restitution, and undergo imprisonment for not less than 9 nor more than 36 months in Lehigh County Prison. Further, defendant was made eligible for work release after 3 months.

The sentence, which is well within the proposed sentencing guidelines (12 Penna. Bulletin Section4), was imposed on the following basis:

(1) The evidence of the guilt of the defendant was clear and convincing.

(2) The defendant's prior record

(3) the fact that the defendant, as an employee of the city, had been placed in a position of responsibility which he violated what is in essence a public trust. i.e. his crime was against the community rather than an individual

(4) the defendant's attitude

In the Court's opinion, defendant's guilt was, as already noted, clearly proven; his attitude was anything but remorseful; indeed if anything it was defiant.

The sentence was not more severe because the defendant does have a good work record and is supporting several dependents. In our judgment, confinement is much more likely to contribute to the rehabilitation of the defendant than is probation. We feel quite strongly that a lesser sentence would very much depreciate the seriousness of the offense, i.e. theft of public funds.

BY THE COURT:

/S/ JOHN E. BACKENSTOE
JOHN E. BACKENSTOE J.

DATED: April 7, 1982

FROM THE RECORD
12th DAY OF April, 1982

CLERK OF COMMON PLEAS COURT CRIMINAL
JUVENILE

/S/LOIS SOBCHACK, DEPUTY

J. 1828/83 (44)

COMMONWEALTH OF PENNSYLVANIA: IN THE SUPERIOR COURT
v. :

JOHN J. RISKO, JR., :NO. 213 Philadelphia, 1982
Appellant :

Appeal from the Sentence of the Court of Common Pleas of Lehigh County, Criminal, at No. 87-1980.

BEFORE: McEWEN, BECK and HOFFMAN, JJ.

PER CURIAM:

FILED MAR 2, 1984

The judgment of sentence of the learned Lehigh County Common Pleas Court Judge John E. Backenstoe is affirmed.

J. 1828/83 (44)

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR
	:	COURT OF
v.	:	PENNSYLVANIA
	:	
JOHN J. RISKO, JR.,	:	No. 213 Phila-
Appellant	:	delphia, 1982

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of LEHIGH County, be and the same is hereby AFFIRMED ON THE JUDGMENT OF SENTENCE OF THE LEARNED LEHIGH COUNTY COMMON PLEAS COURT JUDGE JOHN E. BACKENSTOE.

BY THE COURT:

/S/ J. HANIEL HENRY

J. Haniel Henry
Prothonotary

DATED: March 2, 1984

J. 1828/83 (44)

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	
JOHN J. RISKO, JR., Appellant	:	NO. 213 Philadelphia, 1982

Appeal from the Judgment of Sentence of the Court of Common Pleas of Lehigh County, Criminal, at No. 87-1980.

BEFORE: McEWEN, BECK and HOFFMAN, JJ.

MEMORANDUM OPINION:

We here consider an appeal from a judgment of sentence imposed after appellant was convicted by a jury of two counts of theft by failure to make required disposition of funds received, and one count of theft by deception[1] and sentenced to serve a total term of imprisonment of from nine months to thirty-six months and to make restitution in the amount of $1,155.73 to the City of Allentown. We affirm.

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[1]Respectively, 18 Pa.C.S. §§3927 and 3922.

Appellant asserts that prior counsel was ineffective by reason of a failure to preserve certain of the issues that had been raised in timely filed written post-verdict motions, but which had neither been briefed to nor argued before the trial court. When we study a claim of ineffective assistance of counsel, we must first determine whether the claim is of arguable merit; only if the underlying claim is of arguable merit do we proceed to consider whether the strategy chosen by trial counsel had some reasonable basis designed to effectuate the interests of the client. Commonwealth v. Evans 489 Pa. 85, 94, A.2d 1025, 1028 (1980); Commonwealth v. Kaufman ____ Pa. Super. ____, ____, 452 A.2d 1039, 1044 (1982). If the underlying claim lacks arguable merit, we need not proceed to conduct the second inquiry since counsel may not be deemed to be ineffective for failing to raise a meritless issue. Commonwealth v. Penn

497 Pa. 232, 439 A.2d 1154, cert denied, Penn v. Pennsylvania 456 U.S. 980, 102 Supreme Court, 2251, 72 L.Ed.2d 857 (1982); Commonwealth v. Henry 295 Pa.Super. 47, 440 A.2d 1215 (1982).

We first address whether prior counsel was ineffective for failing to file a brief in support of the contention that "the verdict]was] against the weight of the evidence." While the argument expresses a sufficiency of evidence claim. It is clearly established that the test to be applied during a sufficiency determination is whether, accepting as true all of the evidence and all reasonable inferences arising therefrom which, if believed, the jury could have based its verdict, the evidence is sufficient to prove beyond a reasonable doubt that the accused is guilty of the crime or crimes with which he has been charged. In making this determination, the evidence must be viewed in the light most favorable to the

verdict winner, in this case, the Commonwealth. Commonwealth v. Giles 500 Pa. 456, 456 A.2d 1356 (1983); Commonwealth v. Keblitis 500 Pa. 321, 456 A.2d 149 (1983). The entire record must, of course, be evaluated and all the evidence actually received must be considered whether or not the trial rulings thereof were correct. Commonwealth v. Scarborough ___ Pa. Super. _____, 460 A.2d 310 (1982). "This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt." Commonwealth v. Sullivan 472 Pa. 129, 150, 371 A.2d 468, 478 (1977). Accord Commonwealth v. Sinwell, ____ Pa. Super. ____, 457 A.2d 957 (1983); Commonwealth v. Davenport ___ PA. Super. ___, 452 A.2d 1058 (1982). We have carefully studied the entire record and we conclude that the evidence presented by the Commonwealth supports the findings of the jury that appellant had committed the crimes

charged. As a result, there is no merit to this claim of ineffectiveness.

Appellant also contends that prior counsel was ineffective for failing to preserve the issue raised in post-verdict motions of whether the "Court erred in refusing to grant Defendant's demurrer in the prosecution's case." "Because appellant's counsel did not rest following the adverse ruling on the demurrer but instead presented a case in defense, a challenge to the correctness of this ruling on appeal can be considered only as a challenge to the sufficiency of the evidence as a whole." Commonwealth v. Olds ___ Pa. Super. ___, ___ A.2d (J. 1004/83, filed November 25, 1983). See also Commonwealth v. Downing ___ Pa. Super. ___, ___A.2d ___ (J. 4/83, filed December 2, 1983). Commonwealth v. Bastone, ___ Pa. Super. ____, ___A.2d ___ (J. 1252/83 filed November 18, 1983). Since we have concluded that the evidence was sufficient to support the findings of guilt by the jury, there is no merit to

this assertion.

Appellant further contends that trial counsel was ineffective by reason of a failure to preserve the issue of whether the trial judge correctly charged the jury upon the effect of circumstantial evidence. Our Supreme Court in Commonwealth v. Ohle ___ Pa. ____, ____A.2d ___ (J. 219/83, filed December 14, 1983), reiterated the firmly established principles for evaluating the charge to a jury:

> "A trial court has broad discretion in phrasing its points for charge, and is not bound to give instructions in the form requested, particularly where the form does not reflect a correct interpretation of the law. Moreover, a trial court need not accept counsel's wording, but may chose its own so long as the 'area is adequately, accurately, and clearly presented to the jury for their consideration.' Finally, an appellate evaluation of the charge must be based on an examination of it as a whole to determine whether it was fair or prejudicial"

Id. at p. 18 (citations omitted). Our study of the charge of the distinguished Judge John E. Backenstoe, compels us to conclude that this assertion is without merit and that, therefore, counsel cannot be deemed ineffect-

ive on this basis.

Nor is there any merit to the claim that trial counsel was ineffective for failing to brief or argue the contention that "the closing argument by the district attorney calling attention to 'missing witnesses' constitute[d] prosecutorial misconduct requiring reversal" and that, therefore, "the trial court improperly permitted the Commonwealth to argue the 'missing witness' [rule]." The record belies this contention since the assistant district attorney did not present a "missing witness" argument. While it is true that the assistant district attorney did briefly remark that appellant failed to call as witnesses two individuals that he himself had mentioned during the presentation of his defense, this reference was only fair commentary upon the evidence offered by appellant. This reference in the closing statement does not constitute prosecutorial misconduct. Accordingly, the stewardship of counsel was not, for this reason less

than effective.[2]

Appellant next contends that his sentence is invalid because the sentencing judge may have improperly considered during the sentencing procedding the comments of the prosecuting officer that appellant had been "running his own auto parts store" and that "it was a continuous course of action". "'[If it reasonably appears from a review of the entire record that the sentencing court may have relied in whole or in part upon an impermissible consideration' the sentence is invalid

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[2]It is to be noted that the trial judge, in his charge to the jury, instructed the jury that even though some of the arguments advanced by counsel were designed to appeal to their emotions, that they should not decide the case on a emotional basis, but should rely upon their own recollection of the testimony, as well as their own reasoned judgment upon the evidence presented.

and must be vacated." Commonwealth v. Stufflet, ___ Pa. Super. ___, ___A.2d ___, (J. 1608/83, filed December 16, 1983) quoting Commonwealth v. Crux 265 Pa. Super. 474, 477, 402 A.2d 536, 537 (1979). In the instant case, it does not appear that the sentencing judge relied upon the personal expressions of the prosecuting officer in his determination of what sentence to impose. Rather, our study of the record, as well as the opinion of the sentencing judge, leads us to conclude that the sentence was based upon relevant and permissible factors.

We next address the contention that the sentence was manifestly excessive and a violation of the right against cruel and unusual punishment. A timeless princi;e of this area of the law is that appellate courts are reluctant to intrude upon the sentencing discretion of the trial court and normally leave the sentence undisturbed, so long as it is within statutory limits, because the trial court is in a far better position to weigh the factors

involved in such a determination. This discretion has, however, been circumscribed by not only judicial decisions but also by the Sentencing Code, 42 Pa.C.S. §9701, et seq., and by the Rules of Criminal Procedure.

The Pennsylvania Supreme Court in Commonwealth v. Martin 466 Pa. 118, 351 A.2d 650 (1976), mandated that the court must, in a sentencing determination, consider the character of the defendant as well as the circumstances of the offense. The Sentencing Code, 42 Pa.C.S. §§9721-9726, provides several possible dispositions for criminal offenses as well as guidelines for the sentencing court to consider as it selects the sentence for imposition. Moreover, both the Sentencing Code, 42 Pa. C.S. §9721 et seq. and Commonwealth v. Riggins 474 Pa. 115, 377 A.2d 140 (1977), have provided a mandate that the sentencing court state on the record the reasons for the sentence; and this court has held that when determining whether the sentencing judge has abused his discretion by imposing a

a manifestly excessive sentence, we must review the reasons expressed by the judge for the sentence imposed. Commonwealth v. Valentin 259 Pa. Super. 496, 393 A.2d 935 (1978). Our examination of the record leads us to conclude that the sentencing court has complied with all of these requirements, and has imposed a sentence that is within the statutorily mandated limits and that is not manifestly excessive. The sentence is not, therefore, subject to the attention of this court.

Appellant proceeds to argue that his due process rights were violated since the trial judge did not participate in the consideration of his post-verdict motions. While this claim appears to have been waived since the record does not reflect that appellant expressed or preserved an objection at the post-verdict hearing when it became apparent that the trial judge would not participate as a member of the panel of the court en banc, we will, nenetheless, consider and address

the assertion. Pennsylvania Rule of Criminal Procedure 1123 regulates the conduct of post-verdict motions and provides: "[T]he trial judge shall determine whether post-verdict motions shall be argued before himself alone or before a panel sitting as a court en banc." Pa.R.Crim.P. 1123(e), 42 Pa.C.S. This Rule precisely describes the specific decision to be made by the trial judge but refrains from mention of any mandate that the trial judge be a member of the court en banc. Such eloquent silence reflects the decision of the rule makers to refrain from such a requirement. While we agree that participation by the trial judge in the consideration and decision of the court en banc is not a requirement, we are of the mind that such participation is the preferred practice and suggest that the reason for the failure of the trial judge to be a member of the court en banc should appear of record. In any event, the primary purpose of post-verdict review is to preserve and

and clarify the issues under appeal, a goal that is more efficiently accomplished by conducting the initial presentation of argument upon the claims of error at the level of the Common Pleas Court. Commonwealth v. Koch 288 Pa. Super. 290, 431 A.2d 1052 (1981); Commonwealth v. Berry279 Pa. Super. 32, 420 A.2d 729 (1980). While the trial judge did not here participate in the disposition of the post-verdict motions, the opinion of the court en banc demonstrates that appellant received a full and fair review of his assertions of error. Nor may it be overlooked that while participation by the trial judge in the decision of the court en banc might well enable the members of this court to have the benefit of the response of the trial judge to the asserted claims of trial error, the presence or absence of the trial judge upon the court en banc that provides post-verdict review has no effect upon the review and consideration by the members of this court of the assertions

of appellant, whether of error in the conduct of the trial or otherwise. See Commonwealth v. Jones 457 Pa. 423, 431, 322 A.2d 119, 124 (1974).

We have conducted a careful and through review of the entire record, as well as the briefs of the parties, and conclude that the court en banc, specifically, the distinquished Judges Maxwell E. Davison, James N. Diefenderfer, and Kenneth H. Koch, has, in its able opinion, provided for a proper disposition of the remaining issues presented by appellant.[3]

Judgment of sentence affirmed.

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[3] The remaining issues, as set forth in the statement of issues presented in the brief of appellant, are:

1. Whether or not the defendant was denied the due process of law and placed in double jeopardy in violation of the Pennsylvania and United States Constitutions where the prosecution refiled without further evidence criminal charges which were originally dismissed for want of a prima facie case merely in order to submit the same evidence to a different district magistrate?

II. Whether or not the defendant was denied due process of law under the

[3]Pennsylvania and United States Constitutions where the Commonwealth's motion for change of venue was presented--and opposed by the defendant--in front of one judge, and without explanation, the motion was acted upon by another judge?

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Marlene F. Lachman, Esq.
Prothonotary
Patrick Tassos
Deputy Prothonotary

468 City Hall
Phila., PA 19107
(215) 496-4600

June 29, 1984

Richard J. Orloski, Esq.
CALNAN & ORLOSKI, P.C.
446 Linden Street
Allentown, PA 18102

In re: Commonwealth v. John Risko
No. 181 E.D. Allocatur Docket, 1984

Dear Mr. Orloski:

This is to advise you that your Petition For Allowance of Appeal, filed in the above-captioned matter, was DENIED by the Court on JUNE 28, 1984.

Very truly yours,

/S/ Patrick Tassos

Patrick Tassos
Deputy Prothonotary

PT:ml
cc: William H. Platt, Esq.
District Attorney